88-1287

NO.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. MURRAY, JUSTIN L. MURRAY, AND
JOAN M. MURRAY

Petitioners,

versus

THE UNITED STATES

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI
CIVIL CASE

JAMES A. MURRAY
89 Cornell Circle
Pueblo, Colorado 81005
Telephone: Home (719) 566-1413
Office (719) 545-1834
PRO SE FOR PETITIONER

Schuster's Printing, 126 Mechanic, Pueblo, CO (719) 543-9367

QUESTIONS PRESENTED FOR REVIEW

1. Does the United States have "standing" to challenge Petitioners' mortgage when it is neither a party to the mortgage nor injured by the mortgage, and confer upon the Claims Court jurisdiction, under Article III of the United States Constitution, to declare Petitioners' mortgage null and void.

2. Did the United States Claims Court err in declaring Petitioners' mortgage null and void when its decision is in direct conflict with and contrary to the law of the state of North Dakota.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

JAMES A. MURRAY, JUSTIN L. MURRAY, AND
JOAN M. MURRAY

Petitioners/Plaintiffs/Appellants

versus

THE UNITED STATES

Respondent/Defendant/Appellee

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Federal Circuit entered November 9, 1988.

OPINIONS BELOW

The judgment of the United States Claims Court was filed June 2, 1988, No. 541-85T, by the Honorable Christine Nettesheim, Judge. This opinion is reproduced as Appendix A to this petition.

This decision was appealed. The United States Court of Appeals for the Federal Circuit affirmed the decision on November 9, 1988. This opinion is reproduced as Appendix B to this petition.

A Suggestion for Rehearing In Banc was filed. The United States Court of Appeals for the Federal Circuit denied the Suggestion for Rehearing In Banc on December 9, 1988. This order is reproduced as Appendix C to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article III Sec. 2(1) of the United States Constitution reads:

> Sec. 2. Jurisdiction.(1) The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens, or subjects.

2. 26 U.S.C. Sec. 6337(b)(1) reads:

> Sec. 6337. Redemption of property

(b) Redemption of real estate after sale.—

(1) Period.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

STATEMENT OF THE CASE

The facts are not in dispute. During 1978, Petitioners James A. Murray, Justin L. Murray and Joan M. Murray, (Plaintiffs in the original action and hereafter referred to as Petitioners), had a tenant-farming arrangement with Donald Paul on Petitioners' farm located near Buffalo, North Dakota. The arrangement provided the Petitioners would receive fifty percent (50%) of the yearly harvest. However, Donald Paul sold the harvest and utilized the funds for personal, farming and business expenses, including keeping the Fireside open and operating.

In recognition of his indebtedness to Petitioners, on December 20, 1978, Donald Paul executed a note payable to the Petitioners for $59,000 and due July 1, 1979. This note was secured by a mortgage with Petitioners as mortgagees on property of Mr. Paul's restaurant-nightclub business known as Fireside, Inc. ("Fireside"). The mortgage on Fireside was executed by Donald Paul as President on December 20, 1978 and recorded in the office of the Register of Deeds for Cass County, North Dakota, on the same date.

Fireside, Incorporated, under the laws of North Dakota, was owned by Mr. Paul and Charles Wellentin. Mr. Paul owned 80% of the stock and Mr. Wellentin, 20%. Paul and Wellentin were the sole directors; Mr. Paul serving as President and Vice-President and Mr. Wellentin as Secretary and Treasurer.

At the time Mr. Paul executed the mortgage to Petitioners, Fireside was subject to a first mortgage of approximately $92,000 held by the Casselton State Bank and recorded February 9, 1976. Prior tax liens also existed in favor of the Internal Revenue Service (IRS) totally approximately $25,000 which had been recorded between October 27, 1977 and December 20, 1978.

The IRS seized Fireside's real estate and personal property on April 18, 1979, for failure to remit Federal taxes. On June 8, 1979, after Notice to Fireside, the real property was sold by auction for $301.84 to the United States, the sole bidder. An IRS District Director's deed memorializing the sale was executed on November 30, 1979.

On August 13 and September 9, 1979, Petitioners tendered a check for $320.00 to the IRS to redeem the property. The IRS denied Petitioners redemption of the property by letter dated August 23 and October 4, 1979. The IRS took the position Petitioners' mortgage was null and void since it was executed by one officer of the corporation for a personal debt.

At no time has the United States and/or the Internal Revenue Service ever stated, claimed or alleged they were a party to Petitioners' mortgage and/or were harmed, injured or damaged by Petitioners' mortgage.

Petitioners have at all times recognized the tax liens were

superior to their mortgage and do not question the IRS seizure and sale of the Fireside.

Petitioners maintain they were entitled to redeem the Fireside under the redemption statute, their mortgage is valid until declared null and void by a court of competent jurisdiction after being challenged by an injured party, and the United States lacked "standing" to challenge their mortgage, and therefore, the Court of Claims lacked jurisdiction under Article III of the Constitution to declare their mortgage null and void.

REVIEW OF THE COMPLAINT AND OPINION OF THE CLAIMS COURT AND COURT OF APPEALS

Petitioners filed their complaint in the United States Claims Court on September 17, 1985. Petitioners alleged the United States, by failing to honor their right of redemption, destroyed their mortgage, which is a lien on property and valuable property right, without just compensation, in violation of the Fifth Amendment. Senior Judge White dismissed the Complaint for failure to state a claim upon which relief could be granted. Murray v. United States 10 Cl. Ct. 696 (1986)

Petitioners appealed to the Court of Appeals for the Federal Circuit. The Appeals Court reversed, holding Petitioners had established the elements of a taking claim within the meaning of the Fifth Amendment and remanded the Case for an adjudication of Petitioners taking claim. Murray v. United States 817 F. 2^{d} 1580 (1987)

Petitioners moved for Summary Judgment as the United States has no "standing" to question the validity of their mortgage. The Petitioners further claimed even if the United States had "standing," the North Dakota law clearly holds an improp-

erly signed or acknowledged mortgage is not null and void, but merely does not constitute notice to a subsequent purchaser in good faith for a valuable consideration.

The United States filed a Cross Motion for Summary Judgment claiming Petitioners mortgage was null and void, as it was improperly executed.

On June 2, 1988, the Claims Court entered its Judgment denying Petitioners Motion for Summary Judgment and granted the Cross Motion of the United States for Summary Judgment. The Claims Court ruled the United States has standing to challenge Petitioners mortgage, and Petitioners mortgage was null and void. (Appendix A-1)

Petitioners appealed to the United States Court of Appeals for the Federal Circuit, and the Court of Appeals, on November 9, 1988, affirmed the Claims Court decision. (Appendix A-14)

Petitioners then filed a Suggestion for Rehearing In Banc which the Court of Appeals denied on December 9, 1988.(Appendix A-16)

Petitioners now seek certiorari and are asking the United States Supreme Court to review the decision of the Claims Court as affirmed by the Court of Appeals for the Federal Court.

QUESTIONS PRESENTED FOR REVIEW

1. Does the United States have "standing" to challenge Petitioners mortgage when it is neither a party to the mortgage nor injured by the mortgage, and confer upon the Claims Court jurisdiction, under Article III of the United States Constitution to declare Petitioners mortgage null and void.

2. Did the United States Claims Court err in declaring Petitioners mortgage null and void when its decision is in direct conflict with and contrary to the law of the State of North Dakota.

ARGUMENT

The United States Supreme Court has constantly held for the Federal Courts to have jurisdiction under Article III of the Constitution, the party raising the legal claim or challenge must have "standing."

Two important elements make up "standing." They are:

1) The real party in interest must prosecute the action;
2) The action complained of must have caused injury or damage to the party challenging the action.

Four recent leading Supreme Court cases on Article III jurisdiction and standing are:

Flast et al. v. Cohen (1968) 88 S. Ct. 1942 (392 U.S. 83)

Warth v. Seldin (1975) 95 S. Ct. 2197 (422 U.S. 490)

Valley Forge Christian College v. Americans United for Separation of Church and State (1982) 102 S. Ct. 52 (454 U.S. 464)

Michael Bender et al. v. Williamsport Area School District et al. (1986) 106 S. Ct. 1326

In Flast v. Cohen (1968), Supra, the Supreme Court states (page 1949):

> the jurisdiction of federal courts is defined and limited by Article III of the Constitution. ....the

judicial power of federal courts is constitutionally restricted to "cases" and "controversies."

Continuing:

> Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case - and - controversy doctrine. ....thus no justiciable controversy is presented .... when there is no standing to maintain the action.

Continuing:

> Standing is an aspect of justiciability .... The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before the federal court and not on the issues he wishes to have adjudicated. ..... In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.

In Warth v. Seldin (1975), supra, the Supreme Court discusses "standing" as well as the Court's jurisdiction powers under Article III of the Constitution. The Court states (page 2205):

> ...the question of standing is whether the litigant is entitled to have the Court decide the merits of the dispute or of particular issues. This inquiring involves both constitutional limitations on Federal Court jurisdiction and prudential limitation on its exercise.

Continuing on the same page, the Court states:

> In its constitutional dimension, standing imparts justiciability: whether the Plaintiff has made out a 'case or controversy' between himself and the Defendant within the meaning of Article III. This is the threshold question in every federal case, determining the powers of the Court to entertain the suit.

Continuing, the Court states:

> The Article III judicial powers exist only to redress or otherwise protect against injury to the complaining party.

Continuing on page 2215, the Court states:

> The rules of standing, whether as aspects of Article III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the Courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is the proper party to invoke judicial resolution of the dispute and the exercise of the Court's remedial powers.

In Valley Forge Christian College v. Americans United for Separation of Church and State (1982) supra, the Supreme Court again reiterated the elements of standing.

The Court states on page 473:

> The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to

litigants who can show "injury in fact" resulting from the action which they seek to have the Court adjudicate.

Continuing, the Court states on page 474:

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the Plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interest of third parties."

Continuing:

> Those who do not possess Article III standing may not litigate as suitors in the Courts of the United States.

The Court goes on to state:

> The party who invokes the power (of judicial review) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of his enforcement.

In Michael Bender et al. v. Williamsport Area School District et al., 1986, supra, the Court again discussed the issue of "standing." The question raised and the answer of the Court is clearly set forth on page 1328 which reads as follows:

> This case raises an important question of federal appellant jurisdiction which was not considered

> by the Court of Appeals: Whether one member of a school board has standing to appeal from a declaratory judgment against the board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

The United States Supreme Court has spoken clearly in the above-cited cases regarding "standing" and Article III jurisdiction. The United States Supreme Court has very emphatically stated "standing" is an integral part of jurisdiction under Article III of the United States Constitution, and, without "standing" the federal courts lack jurisdiction.

Further, the United States Supreme Court has emphatically and clearly stated "Standing" consists of two very important elements and they are:

> 1) The real party in interest must prosecute the action or claim;
>
> 2) The action complained of must have caused injury to the party challenging the action.

Without "standing" the Federal Courts lack jurisdiction under Article III of the Constitution.

All the leading legal treatises support the Supreme Court's position on standing and Article III jurisdiction. See:

Wright-Miller-Cooper, Federal Practice and Procedure, Volume 13 and 13A.

Moore's Federal Practice, Volume 12, Supreme Court jurisdiction and practice.

59 Am Jur 2d in the section entitled Parties.

To summarize, "standing" is an integral part of Article III jurisdiction. To have "standing," the proper party must challenge the Claim and further, the party must have sustained some injury or damage.

Without injury or damage, there is no "standing," and, without "standing," there is no Article III jurisdiction. Applying the above simple principle to this case, we find the United States, the party who is challenging the Petitioners mortgage, was neither a party to the mortgage nor injured by the mortgage. Therefore, the United States does not have standing to challenge Petitioners mortgage, and the federal courts, that is, the Claims Court and the Court of Appeals, do not have any jurisdiction to declare Petitioners mortgage null and void.

Simply stated, Petitioners mortgage is valid until declared null and void by a Court of competent jurisdiction after being challenged by an injured party.

The Claims Court, and also the Court of Appeals, simply refused to recognize and discuss the issue of standing, even though Petitioners raised the question.

The Claims Court, on page A-8, states:

> Plaintiffs rejoin that Defendant has no standing to question the validity of the mortgage because the government was not a party to the transaction between Plaintiffs and Mr. Paul and has not been

damaged by Plaintiffs' attempt to redeem.

The Claims Court goes on to state on page A-9:

> Defendant established standing in this case by statute, see Bull v. United States, 295 U.S. 247, 259-60 (1935), and need not establish that it suffered an injury in fact.

The Bull case does not even discuss "standing." Petitioners see nothing in the Bull case that either states or implies that a party can have standing without having suffered any injury or damage.

Furthermore, the Bull case is a 1935 case, and every Supreme Court Case petitioner has cited is a more recent case.

The Claims Court states "standing" is established by statute. Standing is a constitutional requirement. Article III requires the real party in interest must institute the action or claim, and in addition, must have suffered an injury or damage.

Any statute which grants standing, or attempts to grant standing, to an uninjured party is in conflict with and contrary to Article III of the Constitution and is null and void. A statute cannot override the Constitution. The Constitution is the supreme law of the land. The Claims Court conceded the United States was not a party to Petitioners mortgage and did not suffer any injury or damage from Petitioners mortgage. A statute cannot grant standing, therefore the United States lacks standing to challenge Petitioners mortgage and the Federal Courts lack jurisdiction to declare Petitioners mortgage null and void.

The Claims Court and the Court of Appeals have taken it upon themselves to overrule and nullify numerous Supreme Court decisions regarding standing and Article III jurisdiction. In doing so, these inferior Courts have refused to discuss the Supreme Court decisions, or make any attempt to distinguish this case. These inferior courts have refused to follow the rule of law as set down by the Supreme Court and its decisions. The Supreme Court must not, and cannot, allow this to happen. The decisions of the Supreme Court are the law of the land. These inferior courts have a duty, a responsibility, a mandate, to follow the law as set forth in the decisions of the Supreme court. These inferior courts must not be, and cannot be, given the discretion to decide for themselves which Supreme Court decisions they will reject. If this is allowed to happen, it will lead to chaos and confusion.

The Supreme Court must hold the inferior courts accountable and responsible for their actions, and must make sure the inferior courts follow and enforce the Supreme Court decisions.

To do anything less, makes a mockery out of the Supreme Court and its decisions. To do anything less, questions the integrity of the Supreme Court and its decisions and ridicules the Supreme Court.

The Supreme Court must not allow this to happen.

Assuming the United States does have standing to challenge Petitioners mortgage, the second question to be answered is: Did the Court err in declaring Petitioners mortgage null and void when their decision is in direct conflict with and contrary to the laws of North Dakota.

The Claims Court, on page A-9, states:

> ...the issue becomes whether Plaintiff held a valid lien. State laws control legal interest in real property. See United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985); Aquilino v. United States, 363 U.S. 509, 513 (1960).

The Claims Court cites a number of North Dakota statutes regarding execution of instruments, etc.

No statutes cited by the Claims court declares and/or states an improperly executed or acknowledged mortgage or other instrument is null and void.

The leading North Dakota case is First National Bank of Casselton v. Casselton Realty and Investment Company et al., North Dakota Supreme Court (1919) 175 N.W. 720. In that case, which is very similar to our case, the Treasurer of Casselton Realty and Investment Company, who was not authorized by the Board of Directors to execute a mortgage, executed a mortgage in favor of The First National Bank of Casselton. The mortgage was dated December 23, 1915 and recorded on December 27, 1915. Thereafter, the Defendant, Gilbert, obtained a judgment against the Defendant Casselton Realty and Investment Company. His judgment was duly entered and docketed on March 23, 1916. Thereafter, the Plaintiff, First National Bank of Casselton, brought an action to foreclose its real estate mortgage. The Defendant, Gilbert, took the position the Plaintiffs mortgage was invalid and does not constitute a lien superior to his judgment. The North Dakota Supreme Court held 1) Plaintiff's mortgage was not executed and acknowledged by a person authorized to do so, and therefore, it did not constitute notice to subsequent purchasers in good faith and for a valuable consideration; 2) A judgment creditor is regarded as a purchaser in good faith and for valuable consideration. The North Dakota

Supreme Court held Gilbert had a valid lien against the property and the lien of the Plaintiff's mortgage is inferior and subject to the judgment lien. The Court refused to declare Plaintiff's mortgage null and void. The Court simply held, because the mortgage was not properly executed, it did not constitute notice to subsequent purchasers in good faith and for valuable consideration.

In this case, the United States is not a subsequent purchaser in good faith and for a valuable consideration. Accordingly, the Petitioners mortgage would be valid as to the United States.

The Claims Court and the Court of Appeals refused to discuss this leading North Dakota Supreme Court Case in their decisions.

The Claims Court, citing a United States Supreme Court decision, recognized state law controls. However, the Claims Court refused to follow North Dakota law.

Again, the Claims Court refused to follow the dictates of the United States Supreme court which holds state law controls.

Rule 17 of the United States Supreme Court rules provide certiorari is not a matter of right, but of judicial discretion and will be granted only when there are important reasons therefore.

The following are considered important reasons for granting certiorari:

1. When the lower Court decision is in direct conflict with and contrary to decisions of the United States Supreme Court.

2. When the lower Court decision is in direct conflict with and contrary to applicable state law—or decisions of the highest Court in the state.

3. When a Federal Court has departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The United States Supreme Court has the duty, the obligation, and the responsibility to: 1) ensure that all Federal Courts stay within the boundaries of acceptable judicial proceedings; 2) ensure federal laws are applied in a fair manner, and not in an arbitrary or capricious manner; 3) ensure the decisions of the United States Supreme Court are followed and obeyed and not held in contempt.

CONCLUSION

The judgment of the Claims Court, as affirmed by the Court of Appeals for the Federal Circuit, represents a serious departure from acceptable judicial behavior in that their judgments:

1) Fail to follow the requirements for "standing" and "jurisdiction" for Federal Courts under Article III of the United States Constitution as set forth in numerous Supreme Court decisions. Therefore, their decisions are in direct conflict with and contrary to the decisions of the United States Supreme Court.

2) Fail to apply and follow the applicable North Dakota law as set forth in a North Dakota Supreme Court decision. Therefore, their decisions are in direct con-

flict with and contrary to the decisions of the North Dakota Supreme Court.

For these reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted:

JAMES A. MURRAY,
PRO SE FOR PETITIONERS

CERTIFICATE OF SERVICE

I, James A. Murray Pro Se, for Petitioners, hereby certify that I have on January , 1989, by United States mail, postage prepaid, served copies of the foregoing Petition for Write of Certiorari upon all parties required to be served, their names and addresses are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Gary R. Allen
Chief, Appellate Section
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

JAMES A. MURRAY, PRO SE

APPENDIX A

In the United States Claims Court

No. 541-85T

(Filed June 2, 1988)

* * * * * * * * * * * * * * * * * * *

JAMES A. MURRAY, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	* * * * * *	Taking; whether interest taken by Government by refusal to allow lien holder to redeem property sold at tax sale was valid lien.

* * * * * * * * * * * * * * * * * * *

James A. Murray, Pueblo, Colorado, pro se, for plaintiffs.

Elizabeth D. DePriest, Washington, D.C., with whom were Gerald B. Leedom, Mildred L. Seidman, and Acting Assistant Attorney General William S. Rose, Jr., for defendant.

OPINION

NETTESHEIM, Judge.

This case is before the court on cross-motions for summary judgment. The Federal Circuit vacated a judgment of dismissal entered by Senior Judge White upon his decision that the complaint failed to state the required elements of a taking claim. The remand instructed the court to adjudicate plaintiffs' claim that the Internal Revenue Service's extinguishment of plaintiffs' lien by refusing to allow them to redeem the encumbered property and conveying it to a superior lien holder constituted a taking under the fifth amendment to the U.S. Constitution. Murray v. United States, 817 F.2d 1580 (Fed. Cir. 1987),

vacating and remanding 10 Cl. Ct. 696 (1986). After the case was fully briefed, it was transferred to this court on April 11, 1988. Supplemental briefing was ordered, followed by oral argument.[1]

FACTS

The following facts are undisputed. During 1978 plaintiffs James A. Murray, Justin L. Murray, and Joan M. Murray ("plaintiffs") had a tenant farming arrangement with Donald A. Paul on plaintiffs' farm located near Buffalo, North Dakota. This arrangement provided that Plaintiffs would receive 50 percent of the yearly harvest profits. Plaintiffs' share of the 1978 harvest was approximately $59,000. However, these monies were utilized by Mr. Paul for personal, farming, and business expenses.

In recognition of his indebtedness to plaintiffs, on December 20, 1978, Mr. Paul executed a note payable to plaintiffs in the amount of $59,000, compounded at 8-percent interest from March 1, 1979, due on July 1, 1979. The note was secured by a short-term mortgage with plaintiffs as mortgagees on the realty of Mr. Paul's restaurant-nightclub business known as Fireside, Inc. ("Fireside"). The mortgage on Fireside was executed by Mr. Paul as President on December 20, 1978, and recorded in the Register of Deeds office for Cass County, North Dakota, on that date.

Fireside, incorporated under the laws of North Dakota, was owned by Mr. Paul and Charles Wellentin. Mr. Paul con-

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[1] Although plaintiffs moved for summary judgment complete, including damages, defendant cross-moved on liability, e.e., whether plaintiffs held a valid lien at the time that it was extinguished. This opinion treats the issue of liability alone, and it should be noted that the Federal Circuit did not rule on the amount of any damages.

tributed $40,000 and Mr. Wellentin contributed $10,000 to the establishment of Fireside in January 1976. In turn, Mr. Paul received 40,000 and Mr. Wellentin, 10,000 shares of stock at a par value of $1.00 per share. Fireside's 1978 Annual Report for the year ending June 30, 1978, was filed on December 14, 1978, and signed by Mr. Paul as President. It listed Messrs. Paul and Wellentin as the sole directors—Mr. Paul serving as President and Vice-President and Mr. Wellentin, as Secretary and Treasurer.

At the time Mr. Paul executed the mortgage to plaintiffs, Fireside already was subject to a first mortgage in the amount of approximately $92,000 held by the Casselton State Bank and recorded on February 9, 1976. Prior tax liens also existed in favor of the Internal Revenue Service (the "IRS") totalling approximately $25,000, which had been recorded between October 27, 1977, and December 20, 1978.

The IRS seized Fireside's real estate and personal property on April 18, 1979, for failure to remit federal income taxes. On June 8, 1978, after notice to Fireside, the real property was sold by auction for $301.84, to the United States, as the sole bidder. An IRS District Director's Deed memorializing the sale was executed on November 30, 1979.

On August 13 and September 9, 1979, plaintiffs tendered a check in the amount of $320.00 in order to redeem the property. The IRS denied plaintiffs' request by letters dated August 23 and October 4, 1979. In its August 23, 1979 denial, the IRS stated:

> As he (IRS Officer Gordon Sorum) informed you on July 9, 1979, when you came to this office, there was (sic) some questions as to the validity of the mort-

> gage you hold against the Fireside property since it was executed in (sic) behalf of one officer of the corporation for a personal debt...

Letter dated August 23, 1979, from Joyce L. Gasing, IRS District Group Manager, to James A. Murray. In its October 4, 1979 letter, the IRS also took the position that plaintiffs' lien was not valid. The property was not redeemed within 120 days after sale, thereby exhausting the statutory right of redemption. On March 5, 1980, the United States conveyed Fireside's real property for $301.84 to the Casselton State Bank, holder of the first mortgage.

Two suits to obtain Fireside or damages for the refusal to allow plaintiffs to redeem the property were filed by one or more plaintiffs in federal district court. In Murray v. United States, 520 F. Supp. 1207 (D.N.D. 1981), aff'd, 686 F.2d 1320 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983), plaintiffs unsuccessfully sought to establish a waiver of sovereign immunity and, hence, subject matter jurisdiction in federal court on the theory that mandamus was available to quiet title to Fireside or, alternatively, on the theory that a suit for damages could be maintained under the Federal Tort Claims Act, 28 U.S.C. S 1346(b) (1982). Subsequently, in Murray v. United States, 585 F. Supp. 543 (D.N.D.), aff'd, 751 F.2d 271 (8th Cir. 1984) (per curiam), plaintiffs' reliance on the federal mandamus statue, 28 U.S.C. § 1361 (1982), was rejected for failure to state a claim.

Plaintiffs filed their complaint in this court on September 17, 1985. On September 11, 1986, Senior Judge White dismissed the complaint because the statute under which the IRS acted did not mandate the payment of money; because no violation of the due process clause was stated; because plaintiffs as inferior lien holders did not own the Fireside property and

therefore did not have a property interest that could be taken; and because the actions of the IRS, at best, only prevented plaintiffs from exercising their lien, but did not amount to a taking. Murray, 10 Cl. Ct. at 698-99.

DISCUSSION

On appeal the Federal Circuit characterized plaintiffs' property interest under the laws of North Dakota as a lien on the property, in contrast to title to the real estate, and state that the fifth amendment recognizes a mortgagee's lien as a property interest. Murray, 817 F.2d at 1583-84. Plaintiffs contended that "because their mortgage was 'destroyed' when the IRS refused to allow them to redeem the property, it was taken by the government. . . ." Id. at 1583. On the basis that taking jurisprudence was recognized the destruction of materialmen's liens as compensable property and plaintiffs' mortgage is the same type of interest, the appellate court held that by failing to allow plaintiffs to redeem the mortgaged property, the IRS extinguished their lien. Id. Having concluded that plaintiffs had stated "all of the required elements of a taking claim," id. at 1584, the Federal Circuit remanded the case with instructions to adjudicate that claim. The Federal Circuit has established the law of the case, and the statutory scheme under which plaintiffs' claim arose is set out only to provide context for the arguments now urged.

A delinquent taxpayer's real property, as well as other property rights, can be seized by the IRS pursuant to section 6331 of the Internal Revenue Code of 1954, 26 U.S.C. § 6331 (1976) (the "I.R.C."). Seizure is permitted after a 10-day period following notice and demand for payment upon the taxpayer-owner. I.R.C. § 6335(b). Once seizure has taken place, the IRS must issue written public notice stating the sum demanded in

satisfaction of the IRS' tax lien and a description, with reasonable certainty, of the seized property. Id. There is no requirement in section 6335 that notice of seizure must be given to any lien holders. See I.R.C. § 6335 (a).

If the property owner does not pay the tax deficiency, the IRS is authorized to hold a public sale in the county in which the property is located "not less than 10 days nor more than 40 days from the time of giving public notice [of the sale]." I.R.C. § 6335(d). Notification can be given by "publish[ing] [notice] in some newspaper published or generally circulated within the county wherein the seizure is made" or by posted notice in the absence of such a newspaper.[2] § 6335(b). The notice must "specify the property to be sold and the time, place, manner, and conditions, of the sale." Id.

Upon a sale of the property pursuant to section 6335, the IRS gives the purchasers a certificate of sale. I.R.C. § 6338(a). If the United States purchases the property, the IRS executes a deed which is recorded in the proper registry of deeds. § 6338(c). A certificate of sale or deed executed pursuant to section 6338 discharges the property from all liens junior to the tax lien of the United States. § 6339(c); Commercial Mortgage & Fin. Co. v. Woodcock Constr. Co., 51 Ill. App. 2d 61, 200 N.E.2d 923 (1964); see United States V. White Bear Brewing Co., 350 U.S. 1010 (per curiam).

The property can be redeemed before or after a tax sale. I.R.c. § 6337(a), (b). Pertinent to this case is the provision governing post-sale redemption, I.R.C. § 6337(b) (1):

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[2] If no newspaper is published or generally circulated in the county, then notice must be posted at the nearest Post Office location to where the seizure was made and in at least two other public places. I.R.C. § 6335(b).

> The owners of any real property sold as provided in section 6335, their heirs, executors, ar administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property wold, or any particular tract of such property, at any time within 120 days after the sale thereof.

Redemption may be made in an amount equal to the outstanding tax lien, plus interest, at the rate of 20 percent per annum. § 6337(b) (2). The effect of redemption is to restore the property to its owner free only of the United States' tax lien and otherwise fully subject to all prior liens. Samet v. United States, 242 F. Supp. 214, 222-23 (M.D.N.C. 1965).

Plaintiffs in the case at bar were not allowed to redeem Fireside. After the 120-day period for redemption expired, the IRS sold the property to the first mortgagee. Thus, plaintiffs' subsequent lien was extinguished pursuant to I.R.C. § 6339(c).

With principal reliance on Armstrong v. United States, 364 U.S. 40 (1960), the Federal Circuit determined that there was "no difference, for Fifth Amendment [taking] purposes, between [the] Murrays' mortgage lien and the materialmens' liens at issue in Armstrong." 817 F.2d at 1583. In Armstrong the United States exercised an option to take title to uncompleted boats and materials from government shipbuilding companies which had defaulted under their contract. 364 U.S. at 41-42. Petitioners, holding materialmen's liens that had attached under state law, sought compensation for the extinguishment of their liens as a taking under the fifth amendment. Id. at 44-46. Holding that this action constituted a fifth amendment taking, the Supreme Court stated:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lien holders admittedly had compensable property. Immediately afterwards, they had non. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens . . . .

Id. at 48. It appears that although plaintiffs' lien in this case was extinguished, the extinguishment occurred as a result of the tax sale, not the IRS' refusal to allow plaintiffs to redeem the property. However, the issues for decision on remand are whether defendant can contest the validity of plaintiffs' lien and, if so, what the standards are for establishing a valid lien.

1. Defendant argues that plaintiffs' mortgage is invalid as an ultra vires act of Mr. Paul as a shareholder in pledging the property of Fireside to secure his personal debt. Plaintiffs rejoin that defendant has no standing to question the validity of the mortgage because the Government was not a party to the transaction between plaintiffs and Mr. Paul and has not been damaged by plaintiffs' attempt to redeem.

Defendant's right to challenge the mortgage does not derive from any involvement in the underlying transaction between plaintiffs and Mr. Paul. I.R.C. § 6337(b) (1) authorizes the IRS to provide rules for redemption by providing that "any person having . . . a lien" on real property sold under section 6335 "shall be permitted to redeem the property sold" within 120 days after the tax sale. As the federal district court for North

Dakota explained in plaintiffs' earlier litigation seeking to compel reconveyance of Fireside to them, "[a] determination must be made by the District Director, or his agent, whether the person who is attempting to redeem is in fact a person entitled under the statue [section 6337] to redeem." 585 F. Supp. at 546; see also Samet, 242 F. Supp. at 221-22. Defendant establishes standing in this case by statute, see Bull v. United States, 295 U.S. 247, 259060 (1935), and need not establish that it suffered an injury in fact.

2. Since the IRS had the statutory right to determine the persons who qualify to redeem, the issue becomes whether plaintiffs held a valid lien. State law controls legal interests in real property. See United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985); Aquilino v. United States, 363 U.S. 509, 513 (1960). Former section 10-07-02 of the North Dakota Century Code provided:

> Execution of instruments when bylaw silent. In the absence of any provision in the bylaws regulating the execution and acknowledgement of conveyances, transfers, assignments, releases, satisfactions, or other instruments affecting liens upon, titles to, or interests in real estate, the president or secretary of any corporation may execute and acknowledge such instruments on its behalf when authorized so to do by a resolution of the board of directors. A United States corporation which is an agency or instrumentality of the federal government may authorize, by resolution of its board of directors, any one or more of its officers or any one or more persons severally or jointly to execute and acknowledge and such instruments on its behalf.

N.D. Cent. Code § 10-07-02 (1976). Defendant then points to the absence of a provision specifically directed to executing instruments affecting real property in Fireside's Bylaws to establish that Mr. Paul's execution of the mortgage, without the authority of a board resolution, was a nullity. Since section 10-07-02 has been repealed, this court asked the parties to brief the effect of the current state law.

In 1983 North Dakota abolished chapter 10-07, entitled "Transfers of Real Estate and Interest Therein," and enacted a replacement section, 47-10-05.1, codified at chapter 47-10, see 1983 N.D. Sess. Laws 502, §1:

> Presumption of corporate authority of officers—Application. An officer of any foreign or domestic corporation is presumed to have the power and authority to execute and acknowledge, in its behalf, any instrument granting, conveying, or otherwise affecting any interest in or lien upon any property of the corporation, including contracts, mortgages, deeds, plats, replats, easements, rights of way, options, dedications, restrictions, releases, and satisfactions. Any such instrument executed by an officer of the corporation prior to July 1, 1983, and otherwise prior, is valid and effective.

N.D. Cent. Code § 47-10-05.1 (1985) (emphasis added). This section had the effect of retroactively broadening the presumption of corporate authority. See Brend v. Home Development, LTD., 418 N.W.2d 610, 613 (1988). The new law also repealed former chapter 47-10, but did so prospectively. See 1983 N.D. Sess. Laws 502, § 4. Thus, the statutory requirement that execution of a conveyance of interest in real estate by a corporation's president must be approved by a resolution of its

board was in effect when Mr. Paul attempted to convey an interest in Fireside. However, even if section 10-07-02 were not applicable law, any action undertaken by Mr. Paul must be in accordance with the other provisions of Fireside's Bylaws, according to section 47-10-05.01, which reaches this conveyance retroactively.

Fireside has the power to "purchase . . . deal in, manage, mortgage or otherwise . . . transfer" real property. Fireside Articles of Incorporation, art. III. Article VI, § 2 of Fireside's Bylaws provides that "[a]ll bonds, notes and other evidences of indebtedness . . .shall be signed by such persons the directors may [by] . . . resolution prescribe." Although North Dakota law permits the operation of a corporation with only one director, see N.D. Cent Code § 10-19.1-55, and "[a]ny number of offices or functions . . . may be held or exercised by the same person," Fireside's Bylaws prescribe that the Board of Directors must consistsof "not less than 3 nor more than 15 directors." Fireside Bylaws, art. II, § 1. Thus, before any commitment representing indebtedness could be executed on behalf of the corporation, a resolution was required by the directors.

Defendant proffered the affidavit of Mr. Paul which states that in 1978 only Mr. Wellentin and he served on the board and that he "did not inform Mr. Wellentin about [plaintiffs'] . . . request or seek his approval of the transaction." Affidavit of Donald A. Paul, Oct. 27, 1987, ¶¶ 6, 8. Moreover, as noted above, the Annual Report for Fireside, Inc., listed Charles Wellentin as the only director or officer other than Donald Paul as of June 30, 1978. Regardless of whether the corporation's Annual Report was current as of December 20, 1978, Mr. Paul has averred that Mr. Wellentin was a director in 1978. The only evidence plaintiffs have offered to contradict Mr. Paul's affidavit is plaintiff James A. Murray's unsworn representation that Mr. Paul "told me he was the sole stockholder, and therefore, it

was not necessary to inform Mr. Wellentin or seek his approval." Plfs' Br. filed Dec. 21, 1987, at 9. This response is facially defective since it is not in the form of an affidavit. Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 11401, 1404 (Fed. Cir. 1984); D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1150 (Fed. Cir. 1983); see also Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir.), cert. denied, 389 U.S. 852 (1967) (" 'Meet these affidavit facts or judicially die. . . .' "); Royal Indemn. Co. v. United States, 178 Ct. Cl. 46, 51, 371 F.2d 462, 465, cert. denied, 381 U.S. 833 (1967) (if Government has affidavits negating contracting authority, plaintiff must respond with affidavits). Whether hearsay representations in affidavits may be evidence that will defeat summary judgment, see C & L constr. Co. v. United States, 6 Cl. Ct. 791, 803 n.5 (1985), plaintiffs' representation was not in an affidavit. As the Supreme Court recently explained in Celotex Corp. V. Catrett, 477 U.S. 317, 324 (1986), "Rule 56(e) [the Federal Rules' counterpart to RUSCC 56(f)] permits a proper summary judgment motion to be opposed by any of the kinds of evidentary materials listed in Rule 56(c), except the mere pleadings themselves . . . ."[3]

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[3] Pursuant to RUSCC 56(g), defendant had requested additional time to take discovery, specifically to depose Fireside's officers, in order to oppose plaintiffs' motion for summary judgment. Defendant also indicated that it would notice Mr. Paul's deposition. On this basis plaintiffs may have relied on this forthcoming opportunity to examine Mr. Paul under oath and foreswore taking their own discovery of him. Apparently, defendant obtained Mr. Paul's affidavit in lieu of his deposition. Although plaintiffs neither moved pursuant to Rule 56(g) for leave to depose Mr. Paul after defendant submitted his affidavit nor submitted an affidavit requesting discovery, Sweats Fashions, Inc.. v. Pannill Knitting Co., 833 F.2d 1560, 1566-67 (Fed. Cir. 1987); see also Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Corp., 840 F.2d 917 (Fed. Cir. 1988), the court inquired of plaintiffs at a status conference held on April 18, 1988, what discovery, if any, they would adduce if they were allowed additional discovery. Plaintiffs, through Mr. Murray, responded that discovery would not be germane to any issue. See Order entered on Apr. 18, 1988. It should be noted that although plaintiffs proceeded pro se, Mr. Murray is an attorney admitted to practice in the State of Colorado.

Plaintiffs also proffer that there is "no showing on December 20, 1978 Mr. Wellentin was a stockholder or director." Plfs' Br. filed Apr. 11, 1988, at 4. In contending that Mr. Wellentin had to have been a shareholder, plaintiffs miss the point. The North Dakota State Code does not mandate, see N.D. Cent. Code S 10-19.1-34 (no qualification for directors except that director must be individual), nor do the Fireside Bylaws require, see Fireside Bylaws, art. II, §§ 1-10, that only shareholders can be directors.

In light of plaintiffs' failure to rebut defendant's evidence establishing their entitlement to summary judgment, their claim must fail.[4]

CONCLUSION

Plaintiffs' motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted. The Clerk of the Court shall dismiss the complaint.

/s/ Christine Cook Nettesheim
Christine Cook Nettesheim
Judge

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4. Defendant also argues correctly that the mortgage was not acknowledged properly on behalf of Fireside.

Note: This opinion has not been prepared for publication in a volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

88-1530

JAMES A. MURRAY, JUSTIN L. MURRAY, and JOAN M. MURRAY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: November 9, 1988

Before RICH, SMITH, and NEWMAN, Circuit Judges.

PER CURIAM.

DECISION

The decision of the United States Claims Court, in Murray v. United States, No. 541-85T (Cl. Ct. filed June 2, 1988), denying appellants' (the Murrays) motion for summary judg-

ment and granting summary judgment in favor of the United States (Government), is affirmed.

OPINION

The Government contends that the Claims Court lacked jurisdiction over this proceeding because the Murrays failed to file their complaint in that court within the 6-year statutory period set forth in 28 U.S.C. §§ 2401(a), 2501 (1982). We disagree. The Murrays did file their complaint in the Claims Court "within six years after the right of action first accrue[d]." The Government, pursuant to its October 4, 1979, letter to the Murrays, first took the position that the Murrays' lien was not valid and denied their request for redemption. It was less than 6 years later, on September 17, 1985, that the Murrays filed their complaint in the Claims Court.

Turning to the merits, we have carefully reviewed the record and the arguments presented on appeal. The Murrays have given us no grounds to disturb the Claims Court's judgment. Accordingly, on the basis of its opinion, the Claims Court's judgment is affirmed.

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88-1530

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THE UNITED STATES,

Defendant-Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same is declined.

FOR THE COURT

December 9, 1988

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: James A. Murray
William S. Estabrook